No. 18-422

In The Supreme Court of the United States

ROBERT RUCHO, ET AL.,
Appellants,

V.

COMMON CAUSE, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina

AMICUS BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AND THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici curiae are political committees that assist their Republican members achieve electoral victories. The Republican National Committee ("RNC") manages the Republican party's business at the national level, supports Republican candidates and state parties, coordinates fundraising and election strategy, and develops and promotes the national Republican platform. The National Republican Congressional Committee ("NRCC") supports the election of Republicans to the United States House of Representatives by providing direct financial contributions, technical and political guidance, and by making independent expenditures to advance political campaigns. The NRCC also undertakes voter education, registration, and turnout programs, as well as other party-building activities.

Amici curiae have a vital interest in the law regarding redistricting since congressional districts and legislative redistricting directly impact their members, members' constituents, campaigns, elections, and their successors in office. Accordingly, the district court's ruling has widespread implications for *Amici curiae* and their members.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs are filed with the clerk.

INTRODUCTION

This case presents a fundamental question as to the extent to which the federal judiciary should be engaged in reviewing the constant and ongoing political system that shapes how political parties struggle to gain, regain, and control majorities in the United States House of Representatives and in state legislatures. The Plaintiffs below urge the Court to action in order to "take the politics out" of what is inherently a political process. Plaintiffs are wrong. As one well-known Democratic professor and economist once wrote, "[i]t is, of course, neither possible nor desirable to depoliticize government. Policymaking in a democracy must be political – that is, legitimized by popular support rather than by technical analyses. And American democracy, in particular, was designed to be messy and frustrating." Alan Blinder, *Is Government Too Political?*, 76 FOREIGN AFFAIRS 115 (1997).

This Court should decline the invitation to insert the federal judiciary into questions asking which districting plans, duly enacted by state legislatures, are too political, based upon assessments of conflicting opinions of political scientists and prognosticators attempting to predict the future behavior of American voters.

ARGUMENT

On January 9, 2018 a three-judge panel in the United States District Court for the Middle District of North Carolina determined that North Carolina's 2016 Congressional Redistricting Plan ("2016 Plan") constitutes a partisan gerrymander in violation of

the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Article I, Sections 2 and 4 of the United States Constitution. *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018). In doing so, that court determined, *inter alia*, that partisan gerrymandering claims are justiciable and divined its own standards for adjudicating such claims. *Id.* at 619-36 (justiciability); *id.* at 636-38 (Fourteenth Amendment); *id.* 672-75 (First Amendment); *id.* at 683-84 (Article I).

The foundation of the district court's initial opinion, and that supporting its justiciability determination and all of its new legal standards, is that *any* partisan intent in redistricting essentially creates "voter-proof" maps; that regardless of voters' sentiment they will be unable to overcome the partisan intent of map drawers. *See id.* at 612-15; *id.* at 619 ("partisan gerrymandering violates the core principle of republican government . . . that the voters should choose their representatives, not the other way around." (citing *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks omitted); *Common Cause*, 279 F. Supp. 3d at 597 ("The Republican-controlled North Carolina General Assembly expressly directed the legislators and consultant responsible for drawing the 2016 Plan to rely on 'political data' . . . to draw a districting plan that would *ensure* Republican candidates would prevail in the vast majority of the state's congressional districts.") (emphasis added); *id.* at 620-21 ("A partisan gerrymander that is intended to and likely has the effect of entrenching a political party in power undermines the ability of voters to effect

change when they see legislative action as infringing on their rights."); *id.* at 635-36; *id.* at 640 ("a wealth of evidence proves the General Assembly's intent to 'subordinate' the interests of non-Republican voters and '*entrench*' Republican domination of the state's congressional delegation.) (emphasis added); *id.* at 640 ("the Partisan Advantage criterion reflects an express intent to entrench the Republican supermajority in North Carolina's congressional delegation by seeking to 'maintain' the partisan make-up of the delegation achieved under the unconstitutional 2011 Plan"); *id.* at 641-50 (relying on computer modeling which, among other issues, "assumed that the candidate does not matter . . . ."); *id.* at 650, 656-58, 679-80, 686-87; *id.* at 688-90 ("the 2016 Plan amounts to a successful effort by the General Assembly to disfavor a class of candidates and dictate electoral outcomes.") (internal citations and quotation marks omitted); *et seq.*

Eventually on appeal, the Court vacated the judgment of the district court, and remanded the case for further consideration in light of the Court's decision in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). On remand, the district court determined, *inter alia*, that *Gill* did not affect the justiciability of Plaintiffs' claims. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 779, 814 (M.D.N.C. 2018). This opinion similarly rested on the conclusion that partisan redistricting creates voter-proof maps. *See, e.g., id.* at 814 ("the 2016 Plan violates Article I by . . . interfering with the right of 'the People' to choose their Representatives."); *id.* at 821-27 (discussing the various congressional districts and whether they are "winnable for Democratic candidates") (internal quotation marks and citations omitted); *id.* at 829-30

(crediting testimony discussing that "only three [congressional] districts would elect Democrats and the others will not be able to elect Democrats . . . .") (internal quotations and alterations omitted); *id.* at 830-31 (crediting testimony of constitutional injuries due to "skewed" electoral "outcomes"); *id.* at 938 (discussing how the 2016 Plan "entrenched Republicans candidates in power."); *et. seq.*

Shortly thereafter, Appellants-Defendants filed their jurisdictional statement challenging, *inter alia*, whether Plaintiffs' partisan gerrymandering claims are justiciable. On January 4, 2019, this court postponed further consideration of the question of jurisdiction and set argument for the March 2019 session.

The district court's rationale, and indeed that of every district court which has ruled partisan gerrymandering claims to be justiciable in practice, is deeply flawed for at least one fundamental reason: it rests on the presumption that the maps at issue are politically "voter-proof." Every judicial decision to the contrary in the last 35 years has proven wrong. This is because "partisan intent" in map drafting cannot overcome the will of the voters due to shifting voter attitudes and the realities of political campaigns and political environments. Essentially, "[t]he assumption underlying [these plaintiffs' cases] is that party affiliation is a readily discernable characteristic in voters and that it matters above all else in an election." *Whitford v. Gill*, 218 F. Supp. 3d 837, 936 (W.D. Wis. 2016) (Griesbach, J., dissenting). However, "[p]arty affiliation is not set in stone or in a voter's genes. . ." *id.* This mutability is precisely the reason that partisan gerrymandering claims cannot be

justiciable. *See Davis v. Bandemer*, 478 U.S. 109, 160 (1986) (O'Connor, J. concurring).

I. ELECTORAL UPSETS UNDER MAPS JUDICIALLY DETERMINED TO BE "VOTER-PROOF"

The history of redistricting litigation is wrought with examples of courts getting it wrong. Time and time again courts have determined electoral maps to be unconstitutional partisan gerrymanders due to those maps' effect of "entrenching" a political party in power and then subsequently, under those same maps, the supposedly "entrenched" party was defeated, sometimes in spectacular fashion. This history demonstrates that partisan gerrymandering should not be a justiciable claim because the judiciary is not suited to examine such issues.

a. The 1980's

Davis v. Bandemer involved the 1981 redistricting of the Indiana state legislature. 478 U.S. at 109. At the time the 1981 plan was enacted the Governor was a Republican and majorities in both the State House and State Senate were Republican. *Id.* Several Indiana Democrats filed suit alleging that the 1981 plan "constituted a political gerrymander intended to disadvantage Democrats" in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 115. A divided three-judge court held that the reapportionment was unconstitutional and enjoined state officers from holding elections pursuant to the 1981 plan. *Bandemer v. Davis*, 603 F. Supp. 1479, 1495-96 (S.D.

Ind. 1984). Specifically, the district court indicated that the plan contained "a built-in bias favoring the majority party, the Republicans" who made efforts to "insulate itself from risk of losing its control of the General Assembly." *Id.* at 1486, 1488. Similar to the district court in the present case, the *Bandemer* district court seemed to indicate that the plan was intended to proscribe and would result in a "predestined outcome" and "predictable disadvantaging effect[s] . . ." *Id.* at 1492, 1494.

The Court subsequently stayed the judgment of the district court, *Davis v. Bandemer*, 474 U.S. 991 (1985), and reversed the judgment of the district court. 478 U.S. 109. In doing so, a majority of the Court, however, did hold that partisan gerrymandering cases were justiciable *in theory*. *Id.* The *Bandemer* plurality determined that it is necessary for a plaintiff to "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127. The *Bandemer* plurality acknowledged that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.* at 129. Recognizing that redistricting is an inherently political process, the *Bandemer* plurality rejected the notion that unconstitutional discriminatory effect could be shown by "the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice." *Id.* at 131. Instead, the plurality ruled that discriminatory effect in political gerrymandering cases would only be found "when the electoral system is arranged in a manner that

will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132 (emphasis added). The plurality held that a plaintiff group must prove "a history (*actual or projected*) of disproportionate results" in conjunction with indicia that the group has "essentially been shut out of the political process." *Id.* at 139 (emphasis added).

Justice O'Connor, joined by Chief Justice Burger and Justice Powell, in her concurrence wisely took issue with the majority's justiciability determination regarding the political question issue. *Id.* at 144. Specifically, she took issue with the same elemental problems Amici Curiae take issue with here: factual questions concerning electoral success are impossible for anyone, let alone the judiciary to determine to a degree of certainty. *Id.* at 156-60.

The *Bandemer* plurality eventually held that the results of a single election were insufficient to establish discriminatory effect.

Indiana's subsequent elections, therefore, were conducted under the map previously declared unconstitutional by the *Bandemer* district court. During the 1986 General Assembly election, this "predestined" and "predictable" map yielded Democrats an increased share of the State House from 39 Democrats and 61 Republicans to 48 Democrats and 52 Republicans. Doug Richardson, *Democrats Celebrate Gains in Congress, State Legislature*, THE ASSOCIATED PRESS (Nov. 5, 1986); The Associated Press, *Key Races State By State, At A Glance* (Nov. 6, 1986, PM cycle). Indiana's 1988 General Assembly election was also conducted under the same map and in that year, Democrats increased their electoral share in the State House, resulting in

an even 50 Democrat and 50 Republican split, and increased their share of the State Senate from 20 Democrats and 30 Republicans to 24 Democrats and 26 Republicans. Anne Hazard, STATES NEWS SERVICE (Nov. 11, 1988); see also Rick Gladstone, *Democrats Gain Strategic Victories In State Legislatures*, THE ASSOCIATED PRESS (Nov. 9, 1988, PM Cycle).[2] In 1990, the last election under the 1981 plan, Democrats took control of the State House with 52 Democrats and 48 Republicans. The map, despite a district court's predetermination that it favors Republicans, ultimately did not have the electoral consequences of being politically voter-proof.

The circumstances surrounding *Bandemer* show exactly why partisan gerrymandering claims should be nonjusticiable. In order to have a valid claim, litigants must prove that "the electoral system is arranged in a manner that *will consistently* degrade a voter's or a group of voters' influence on the political process as a whole." *Bandemer*, 478 U.S. at

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[2] While *Bandemer* concerned legislative redistricting, the 1981 plan's congressional districts are another great example of voter volatility. *See* Michael Orekes, *The 1990 Elections: The Future - Redistricting; Elections Strengthen Hand of Democrats In '91 Redistricting*, THE NEW YORK TIMES (Nov. 8, 1990) ("[E]ven lawmakers' best efforts at gerrymandering can have unintended results. In Indiana in 1981 the Republicans had control over drawing district lines, and they set out to oust as many Democrats as possible when national reapportionment cost the state a Congressional seat. But in their zeal the map makers apparently spread the Republican support too thin. In 1980 seven Democrats and four Republicans represented Indiana in Congress. In the first election after redistricting, in 1982, the breakdown was five and five. But in the Congress that convenes next January, the Indiana delegation will be eight Democrats and only two Republicans.").

132 (emphasis added). It is impossible for any litigant to sufficiently meet the discriminatory effect prong because it is impossible to make completely accurate future projections of disproportionate election results. *See also Badham v. March Fon Eu*, 694 F.Supp. 664, 670 (N.D. Cal. 1988) (three judge panel) *sum. aff'd* (citing a district court's refusal to referee a dispute over projected disproportionate election results.). *See also id.* at 672-73 (rejecting Republicans' challenge to California redistricting plan because Republicans were still able to exercise *some* political power.).

b. The 1990's

In *Pope v. Blue*, 809 F. Supp. 392 (W.D. N.C.) sum. *aff'd*, 506 U.S. 801 (1992) (mem.), the Republican Party of North Carolina and a group of voters brought an action challenging the State of North Carolina's federal congressional redistricting plan ("1992 Plan") as a partisan gerrymander in the United States District Court for the Western District of North Carolina. While the three-judge *Pope* district court seemed to doubt that it would be possible for the plaintiffs to corroborate discriminatory effect under *Bandemer*, it assumed for purposes of the motion to dismiss, *i.e.* taking the allegations of the complaint as true, "that the plaintiffs could, theoretically, prove that the [1992 Plan] would establish a 'projected history' of disproportionate results." *Id.* at 396-97.[3]

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[3] As the *Pope* district court succinctly stated, "[t]he gravamen of the plaintiffs' action is that the [1992] Plan adopted by the Democratic legislature *will* result in disproportionately high representation for the Democratic Party in the state's

Nonetheless, the district court dismissed the case for failure to state a claim because it found the plaintiffs' claims failed under the second prong of the *Bandemer* test for discriminatory effect—plaintiffs did not allege that the state's redistricting plan had caused them to be shut out of the political process and plaintiffs could not make the showing that they had been consistently degraded in their participation of the political process as a whole, not just in the process of redistricting. *Id.* at 396-97. Accordingly, the subsequent congressional elections in North Carolina were held under the 1992 Plan which was allegedly politically gerrymandered to favor Democrats.

Despite the *Pope* plaintiffs' claims, and the *Pope* district court's holding that those plaintiffs could theoretically prove a projected history of disproportionate electoral results, the voters of North Carolina did not vote as "projected" under the 1992 Plan. At the time of the *Pope* litigation Democrats controlled 8 congressional seats and Republicans controlled 4 congressional seats in North Carolina. In the very next election in 1994, Democrats won only 4 congressional seats and Republicans won 8 under the exact same plan. During the following election in 1996, North Carolina voters elected 6 Democrats and 6 Republicans to Congress. In 1998 and 2000, North Carolina elected 7 Republicans and 5 Democrats to Congress. None of the parties to *Pope v. Blue*, nor the district court, accurately predicted how the

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congressional delegation." *Pope*, 809 F. Supp. at 396 (emphasis added).

voters of North Carolina would behave in subsequent elections.

c. The 2000's

Then came *Vieth v. Jubelirer*, 541 U.S. 267 (2004), in which a group of registered Democrats challenged Pennsylvania's congressional redistricting plan as an unconstitutional partisan gerrymander in violation of Article I and the Fourteenth Amendment. The *Vieth* plurality, composed of Chief Justice Rehnquist, and Justices Scalia, O'Connor, and Thomas, determined that partisan gerrymandering claims present a nonjusticiable question and would overturn *Bandemer*. Specifically, the *Vieth* plurality held that, *inter alia*, it was impossible to determine the effects of partisan gerrymandering. *Id.* at 287 (*plurality*).

> [A] person's politics is rarely as readily discernible--and never as permanently discernible--as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.

Id. *(plurality)* (citing *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment).

With the challenge to Pennsylvania's congressional plan defeated, Pennsylvania's subsequent congressional elections were held under it. At the time of *Vieth* in 2004, Pennsylvania had 12 Republican members of Congress and 7 Democratic members of Congress. During the 2006 elections, just one election cycle after the *Vieth* plaintiffs and the dissenting members of the Court would have struck the plan as unconstitutional because, *inter alia*, it served to heavily favor and entrench Republicans, Democrats won 11 congressional seats and Republicans won only 8 congressional seats. In 2008, only 4 years after *Vieth*, Democrats increased their share of the Pennsylvania congressional delegation to 12 Democrats and 7 Republicans. Justice Scalia could not have been more right.

d. The 2010's

In 2015, a group of Democratic citizens of Wisconsin challenged that state's legislative redistricting plan passed in 2012, ("Act 43") as a partisan gerrymander in violation of the First and Fourteenth Amendments. *Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018). In November, 2016, a three-judge panel of the United States District Court for the Western District of Wisconsin agreed, enjoining the defendants from using the Act 43 map in future elections and ordered them to enact a remedial districting plan. The district court supported its determination with testimony and expert reports of political scientists who testified that their calculations demonstrated that Act 43 did not yield a

change in Republican-held seats even in hypothetical wave elections that most favorably favor Democrats, and that Republicans will be heavily favored "for the lifetime of the plan." *Whitford*, 218 F. Supp. 3d at 860, 898-910. The district court also referred to Act 43 as "lock[ing]-in" Republican victories, *id.* at 886, and "maintain[ing] a comfortable majority" for Republicans in the legislature. *Id.* at 895. The district court essentially found that it was impossible for Democrats to ever win more than their then-existing current share of the legislature under that plan. *Id.* 860, 886, 895, 898-910.

The defendants appealed directly to the Court, which, after staying the district court's judgment, 137 S. Ct. 2289, (2017), reversed on standing grounds. *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Accordingly, the map remained in place despite plaintiffs' experts testifying that Democrats will not be electorally successful given the composition of the current districts.

However, despite the dire predictions in expert testimony by political scientists and findings by the district court, Wisconsin Democrats have fared well in recent elections. In June 2018, a Democrat won a special election in northeastern Wisconsin's First Senate District, which voted for Republican Donald Trump by a significant 17-point margin in the 2016 presidential election. Tara Golshan, *Democrats just won a Wisconsin special election Scott Walker didn't want to have*, VOX (June 13, 2018), https://www.vox.com/2018/6/12/17455922/wisconsin-special-elections-results-june. In January 2018, Democrats flipped a rural state senate district, which Donald Trump carried by 17 points, with a comfortable 10-point margin of victory. David

Weigel, *Democrats flip traditionally conservative Wisconsin senate seat, kicking off 2018 election season*, CHICAGO TRIBUNE (Jan. 17, 2018), https://www.chicagotribune.com/news/nationworld/politics/ct-wisconsin-state-senate-election-20180116-story.html. Further, during the 2018 general election Democrats flipped an additional state assembly seat. Wisconsin Elections Commission, 2018 Fall General Election Results, https://elections.wi.gov/elections-voting/results/2018/fall-general (accessed Feb. 3, 2019).

In 2018 a smorgasbord of legal challenges to Pennsylvania's 2011 congressional redistricting plan ("2011 Plan"), in both state and federal court, culminated in a fractured Supreme Court of Pennsylvania striking the 2011 Plan as unconstitutional under the Pennsylvania Constitution. *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282 (Penn. 2018), *cert. denied*, *Turzai v. Brandt*, 139 S. Ct. 445 (2018). Specifically, the majority of that court agreed with the plaintiffs and determined that the 2011 Plan violated Article I, Section 5 — the Free and Equal Elections Clause — of the Pennsylvania Constitution because, *inter alia*, "Republicans' advantage is *nearly impossible to overcome*" and Democrats' "have been denied *any 'realistic opportunity to elect representatives of their choice . . . .'*" *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766 (Penn. 2018) (emphasis added) (quoting plaintiffs' Petition for Review at ¶¶ 118-19) cert. denied, *Turzai v. Brandt*, 139 S. Ct. 445 (2018). The court enjoined the 2011 Plan's further use with the very notable exception of the March 13, 2018 special election for Pennsylvania's 18th Congressional

District, which was to be conducted under the 2011 Plan. *League of Women Voters of Pa.*, 175 A.3d at 284; *League of Women Voters*, 178 A.3d at 741, n. 7.

Pennsylvania's 18th Congressional District was held by a Republican since 2003, who consistently carried the district with at least 58 percent of the vote. Once that congressman retired, a special election was called for March 13, 2018 in order to fill the seat until the 2018 general election. Office of Governor Tom Wolf, *Governor Wolf Sets Special Election For Pennsylvania's 18th Congressional District* (Oct. 23, 2017), https://www.governor.pa.gov/governor-wolf-sets-special-election-pennsylvanias-18th-congressional-district/. The Democratic candidate, Conor Lamb, won the March 13 special election with 49.8 percent of the vote. Nate Cohn, Josh Katz, Sarah Almukhtar, and Matthew Bloch, Pennsylvania Special Election Results: Lamb Wins 18th Congressional District (Apr. 26, 2018), https://www.nytimes.com/interactive/2018/03/13/us/elections/results-pennsylvania-house-special-election.html?mtrref=www.google.com&gwh=E7A203251FBD534ADB47DC7C979325A7&gwt=pay. This very district was used as an example by plaintiffs' experts and credited by the Supreme Court of Pennsylvania, as a district in which it was "impossible" for Democrats to overcome Republican's political "advantage." *League of Women Voters*, 178 A.3d at 766 (quoting plaintiffs' Petition for Review at ¶¶ 118-19; *id.* at 764 n. 26; *id.* at 760-61; *id.* at 773 (crediting the testimony of Dr. Jowei Chen); *id.* at 788; et. seq. Despite the omnipotence and electoral certainty proffered by plaintiffs' experts, and the Pennsylvania courts, the Pennsylvania 18th

congressional district was unexpectedly won by a Democrat.

In December 2017, a group of Michigan voters and the League of Women Voters of Michigan brought a suit challenging Michigan's 2011 congressional and state legislative maps as unconstitutional political gerrymanders under the First and Fourteenth Amendments. *League of Women Voters of Mich. v. Johnson*, 2:17cv14148 (filed Dec. 22, 2017) (hereinafter "Compl."). In their complaint, the plaintiffs describe Michigan's political maps as a "durable and severe gerrymander" which "preserve[s] and enhance[s] the controlling party's power." Compl. at 2. Plaintiffs claimed that "[t]here is a near zero chance that the efficiency gaps for the [plan] will neutralize during this decade, let alone "switch signs" to favor Democrats. Compl. at 23. For example, plaintiffs' expert Christopher Warshaw, an Assistant Professor of Political Science at George Washington University, stated that Michigan's efficiency gaps "are durable, and thus partisan gerrymandering in [the] state legislature[] is unlikely to be remedied through the normal electoral process". Plaintiffs Expert Report, Christopher Warshaw at 32 (June 1, 2018).

At the time the Michigan plaintiffs filed their complaint and their "experts" authored their reports, Republicans held 9 congressional seats while Democrats held 5 congressional seats, Republicans held 27 state senate seats while Democrats held 11, and Republicans held 63 state house seats while Democrats held 47. Despite the "durable Republican gerrymander" Michigan Democrats were incredibly successful during the 2018 elections. Democrats flipped 2 Congressional seats, resulting in an evenly

split congressional delegation of 7 Republicans and 7 Democrats. Democrats flipped 5 additional state senate seats, resulting in a closely split state senate of 22 Republicans and 16 Democrats. And, Democrats flipped 5 additional state house seats. The "durability" of Michigan's partisan gerrymander was apparently limited to elections prior to 2018.

e. Other Examples

The judiciary's inability to predict election results is not limited to claims of partisan gerrymandering in legislative elections. Until the early 1990's, superior court judges in North Carolina were elected on a statewide basis. Samuel Latham Grimes, *Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges*, 76 N.C. L. REV. 2266, 2286 (1998). In the late 1980's the North Carolina Republican Party, unhappy with the statewide election of superior court judges brought suit. *Id.* at 2285; In *Republican Party v. Hunt*, 841 F. Supp. 722 (E.D.N.C. 1994), *aff'd as modified sub nom*; *Republican Party of N.C. v. N.C. State Bd. of Elections*, 27 F.3d 563 (4th Cir. 1994), *remanded sub nom*; *Republican Party v. Hunt*, 77 F.3d 470 (4th Cir. 1996). The state Republican Party asserted that Republicans would be successful in several areas if superior court elections were held district-wide rather than statewide. *See id.* at 726. Because the Democratic Party held a wide margin in voter registration, the Republicans argued that the Democratic candidates would *always* win in statewide elections *See id.* As a result, the United States District Court for the Eastern District of North Carolina held that statewide elections of

superior court judges were unconstitutional because they diluted Republican voting power. *Id.* at 732. "Reality seemed to support the court's conclusion because only one Republican had ever been elected to a superior court judgeship in a statewide election." Samuel Latham Grimes, *Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges*, 76 N.C. L. REV. 2266, 2285 (1998). Accordingly, the district court ordered that superior court candidates be elected by voters in their home districts, but also appear on the statewide ballot just in case the decision was reversed by a higher court. *Id.* at 733-34.

Notwithstanding the district court's findings, Republican candidates for superior court were very successful in the 1994 statewide general elections, winning all court of appeals seats and carrying the statewide vote in 8 superior court races. Samuel Latham Grimes, *Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges*, 76 N.C. L. REV. 2266, 2285 (1998). Despite plaintiffs' and the district court's predictions, the new election procedure actually disadvantaged Republican candidates in a number of races in which they were successful on the statewide ballot, but lost close races to Democratic candidates in their home districts. *Id.* at 2285 n. 174.

In light of the Republican successes in the 1994 statewide general election, the Fourth Circuit Court of Appeals reconsidered *Hunt*. Defendants below argued that the Republican Party "failed to carry its burden of showing unconstitutional discriminatory effects resulting from the statewide election of superior court judges." *Id.* at 2286 (citing *Republican Party v. Hunt*, 1996 WL 60439, at *1-4 (4th Cir.

1996)). The Court of Appeals determined that the results of the 1994 elections "were directly at odds with the recent prediction by the district court that Republican electoral exclusion would continue unabated into the future" and remanded the case to the district court for further consideration. *Id.* Eventually, the North Carolina General Assembly, likely tired of the uncertainty created by the judicial decisions, declared all superior court judges would be elected from local districts starting in 1996 and that starting in 1998 those elections would be non-partisan. Samuel Latham Grimes, *Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges*, 76 N.C. L. REV. 2266, 2286 (1998).

f. Judicial Elections Predictions Have Not Yet Been Accurate

This history clearly demonstrates that, respectfully, the judiciary cannot be the best arbiter of questions of partisan gerrymandering or claims of political harm, because state and federal judges continuously fail to be able to see clearly the future. There simply are no reliable standards the judiciary, or anyone else for that matter, can employ to predict the future behavior of the electorate. Accordingly, partisan gerrymandering claims cannot be justiciable.

II. VOTER PREFERENCE IS NOT IMMUTABLE

No matter how well judges might think they can determine the effects of partisan influences on

redistricting, undoubtedly a necessary part of the justiciability of these types of claims, they are unable to do so because voters' partisanship, partisan affiliation, political positions, and electoral choices are not immutable. There are many causes to this mutability but the result is all the same—every voter does not vote based solely on partisanship in every instance. *See Bandemer*, 478 U.S. 156-60 (O'Connor concurring); *Vieth*, 541 U.S. at 287 (*plurality op.*).

The changing and dynamic electorate has been a feature of politics in America for decades. The publication *Dynamics of the Party System: Alignment and Realignment of the Political Parties* by noted scholar James L. Sundquist provides this:

> Every election sees some change in the distribution of the vote between the parties. A Democrat who dislikes his party's candidate or is attracted by the Republican nominee may vote Republican, or vice versa. A party's record in office, or its stand on particular issues, will attract or repel at least some voter, in every contest.

James L. Sundquist, *Dynamics of the Party System: Alignment and Realignment of the Political Parties* 4 (Brookings Institution Press 2011). This is precisely the sort of long-term view of political parties and candidate performance that the proponents of partisan gerrymandering claims ask this court to eschew. They ask this Court to direct federal judges to act as political scientists and statisticians. They urge this Court to demand that federal courts look at a handful of recent elections

and assume that future elections will always result the same way as in the past. The problem with this view of the American body politic is that it ignores the incredibly dynamic and ever-changing nature of election results and voter behavior.

One need only look to the elections of 2012, 2016, and 2018 to see that voter preferences change candidate-to-candidate and year-to-year regardless of partisan affiliation. In 2016 Donald Trump was elected to the presidency. *See* David Wasserman, *Purple America Has All But Disappeared*, FIVETHIRTYEIGHT (Mar. 8, 2017), https://five thirtyeight. com/features/purple-america-has-all-but-disappeared/. Donald Trump won the majority of the vote in 21 congressional districts Barack Obama carried only 4 years earlier in 2012. Nathaniel Rakich, *Election Update: The Swing District Showdown*, FIVETHIRTYEIGHT (Sep. 12, 2018), https://fivethirtyeight.com/features/election-update-the-swing-district-showdown/. Further, 206 counties voted for both Obama and Trump. *See* David Leip, *Atlas of U.S. Presidential Elections*, available at https://uselectionatlas.org. These were two of the most opposite presidential candidates of the modern era in terms of style and ideology, and yet 21 congressional districts and 206 counties voted for them both.[4] In 2016, the voters of 12 congressional districts both voted for Trump and to elect a Democrat to Congress. Aaron Bycoffe and Nate

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[4] Further, Hillary Clinton won the majority of the vote in 13 congressional districts Mitt Romney carried in 2012. Nathaniel Rakich, *Election Update: The Swing District Showdown*, FIVETHIRTYEIGHT (Sep. 12, 2018), https://fivethirtyeight.com/features/election-update-the-swing-district-showdown/.

Silver, *Tracking Congress In The Age Of Trump, 115th Congress*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/congress-trump-score/ (last accessed Jan. 30, 2019). Conversely, in 2016, Republicans won 23 congressional districts in which Hillary Clinton won the popular vote. David Nir, *Daily Kos Elections' Presidential Results by Congressional District for the 2016 and 2012 Elections*, DAILY KOS (NOV. 19, 2012), https://www.dailykos.com/stories/2012/11/19/1163009/-Daily-Kos-Elections-presidential-results-by-congressional-district-for-the-2012-2008-elections. In 2018 the voters of 9 congressional districts who voted for Trump in 2016 elected Democrats to Congress. *Id.* at *116th Congress*. And there are currently 31 Democratic Members of Congress from districts that voted for Donald Trump in 2016. *See* Kyle Kondik, *House 2020: The new crossover districts*, RASMUSSEN REPORTS (Nov. 29, 2018), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_kyle_kondik/house_2020_the_new_crossover_districts.

This volatility is not only present in voting between offices, but also between subsequent elections for the same office. For example, during the 2018 election 41 congressional districts flipped from Republican to Democrat. Sean McMinn, *Where The Suburbs Moved Left — And How The Shift Swung Elections*, NPR (Nov. 27, 2018), https://www.npr.org/2018/11/27/668726284/where-the-suburbs-moved-left-and-how-it-swung-elections. *See also supra*. In fact, some of the biggest county flips in the South in 2018 were in the suburbs of Charlotte, North Carolina, the very state at issue in the present case. *Id.* This huge swing over the course

of only 2 years cannot be explained only in terms of voter migration, but also in terms of cross-party voting from year-to-year and candidate-to-candidate.

Voters defect from parties all the time. "In every election cycle a substantial portion of partisan voters defect and cast their ballots for candidates from the other party." Paul S. Herrnson and James M. Curry, *Issue Voting and Partisan Defections in Congressional Elections*, vol. 36, no. 2 LEGISLATIVE STUDIES QUARTERLY 281, 282-83 (2011). There are innumerable reasons for these defections, such as presidential popularity, preference for creating divided government,[5] incumbency favoritism, social contexts, whether a candidate is a prominent hero or celebrity, and even the physical attractiveness of a particular candidate. *Id.* at 283.

Issues and issue-based campaigning also lead directly to defection among "partisan" voters. *Id.* at 284. These issues can be "party-owned," *i.e.* those which differentiate one political party from the other. *Id.* Party-owned issues can also "change quite dramatically across generations as the result of new events and new political issues, as well as the positions the parties take." *Id.* Alternatively, candidates and their allies strategically set issue agendas to support their candidacy, and research has shown that "voters are fairly responsive to such

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[5] Recent studies have shown that some voters switch their electoral choices based on who is in control of the executive in order to balance political power. Michael A. Bailey and Elliott B. Fullmer, *Balancing in the U.S. States, 1978-2009*, VOL. 11, NO. 2 STATE POLITICS & POLICY QUARTERLY 158 (2011). This balancing behavior results in voters disfavoring the party in control of the executive when voting in midterm elections at both the federal and state levels. *Id.* at 149.

agenda-setting efforts." *Id.* at 285. Regardless of the type of issue, it can have substantial crossover appeal, causing voters to defect from the party with which they have traditionally identified. *Id.* at 295-97.

> [I]ssues have an impact on voter decision making in congressional elections—one that extends beyond shoring up of the votes of partisans or winning the votes of independents. . . . [Issues] have the potential to encourage some voters to look beyond their party identification and vote for a candidate of the opposing party. . . . Although an individual's partisan attachments may be a stable part of their social identity . . . results suggest that some voters can and do act contrary to their partisanship.

Id. at 298-99.

Recent studies also suggest that voters weigh ideology differently depending on where they fall in the ideological spectrum. Specifically, moderate voters, those who identify as neither ideologically conservative or liberal, weigh the ideology of their preferred congressional candidates much less and may not even be able to identify the ideology of their preferred candidate. *See generally* James Adams, et al., *Do Moderate Voters Weigh Candidates' Ideologies? Voters' Decision Rules in the 2010 Congressional Elections*, UNIVERSITY OF CALIFORNIA, DAVIS (Dec. 12, 2013), https://www.vanderbilt.edu/csdi/events/Adams_Paper.pdf. The most recent data suggests that self-identified moderates, and

those who are unable to classify themselves, make up the majority of the U.S. adults. Lydia Saad, *Conservative Lead in U.S. Ideology Is Down to Single Digits*, GALLUP (Jan. 11, 2018), https://news.gallup.com/poll/225074/conservative-lead-ideology-down-single-digits.aspx. Accordingly, the majority of adults in the United States make their voting decisions not based on ideology at all, but on other more amorphous factors. The malleable nature of voters' preferences results in real competition for their votes.

Further, voting trends change over time. These trends can be based on changes in electoral district demographic structure including socioeconomic factors, race, education, age, and so forth. Rob Griffin, Ruy Teixeira, and William H. Frey, *Report: America's Electoral Future, Demographic Shifts and the Future of the Trump Coalition*, BROOKINGS (Apr. 19, 2018), https://www.brookings.edu/research/americas-electoral-future_2018/. Further, elections have been, and will continue to be, swung by unpredictable third-party voter activity. *Id.* This is exactly what happened in 2016, and it will happen at unforeseen times in the future. *Id.*

The dynamic nature of this system is not a new phenomenon. One published study nearly 20 years ago was titled *Electoral Continuity and Change, 1868-1996*, Electoral Studies, 1998, Larry Bartels. One illuminating chart from the article, showing the constancy of volatility in the popular vote for president over long periods of time. That chart is reproduced here:

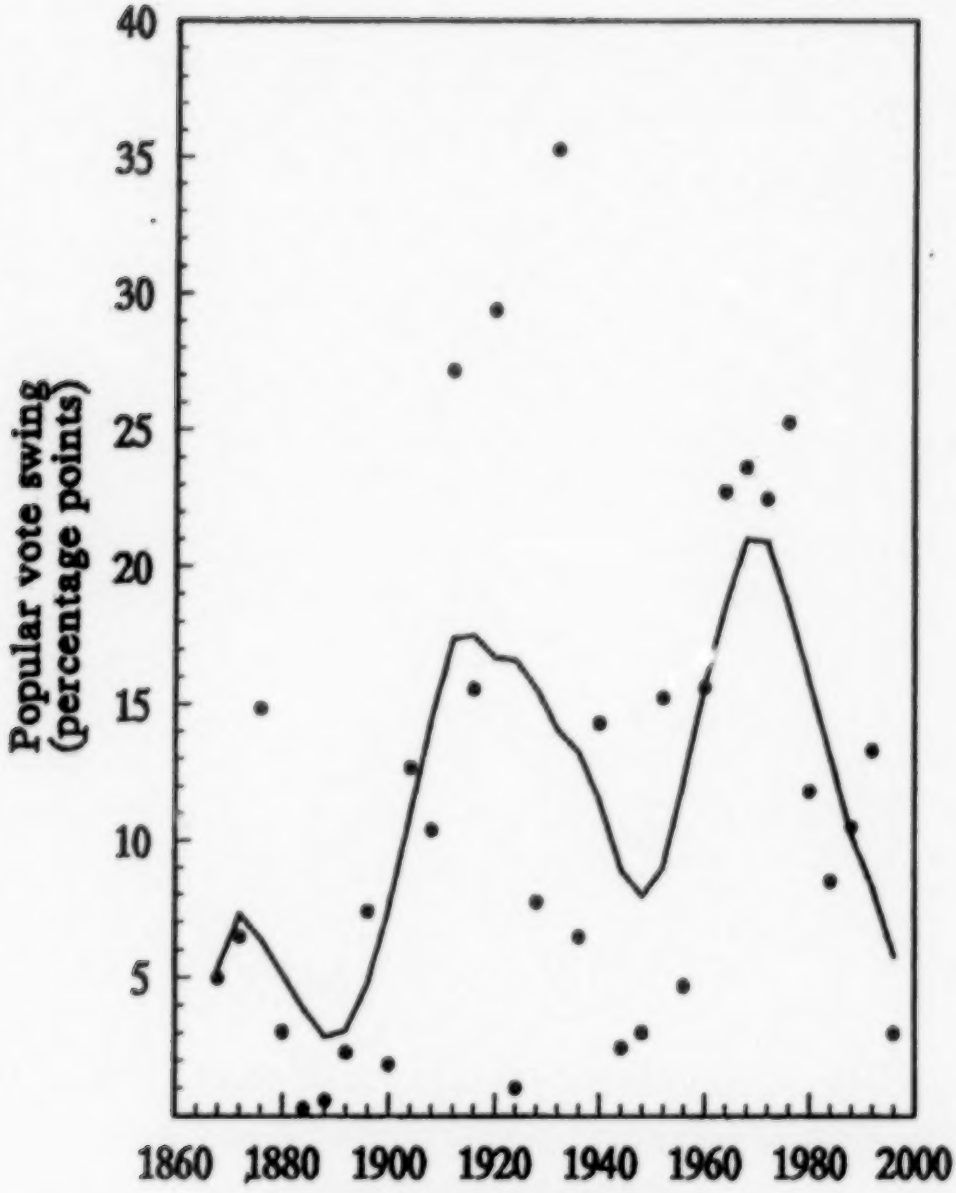

Fig. 10. Electoral volatility, 1868–1996

Electoral volatility, Bartels concludes, must be looked at over long periods of time, and that there are constant changes in the voting behavior of the electorate.

A look at the partisan composition of state legislatures from 1990 through 2000 provides a good visual representation. In most states then, state legislatures enacted redistricting plans as ordinary legislation. In 1990, Republicans held 6 state legislatures, Democrats held 29, and 14 were split control.[6] By 2000, Republicans held 18 state legislatures, Democrats held 16, and 15 were split control. A chart depicting this is available at the National Conference of State Legislatures (NCSL), *Partisan composition of State Legislatures 1990-2000*, http://www.ncsl.org/documents/statevote/legiscontrol_1990_2000.pdf (accessed Feb. 2, 2018) and is reproduced here:

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[6] Nebraska has a non-partisan unicameral legislature.

NCSL

Partisan composition of State Legislatures 1990-2000

(Partisan composition as reported in January of each year.)

State	1990 Legis Comp.	1992 Legis Comp.	1994 Legis Comp.	1996 Legis Comp.	1998 Legis Comp.	2000 Legis Comp.
Alabama						
Alaska						
Arizona						
Arkansas						
California						
Colorado						
Connecticut						
Deleware						
Florida						
Georgia						
Hawaii						
Idaho						
Illinois						
Indiana						
Iowa						
Kansas						
Kentucky						
Louisiana						
Maine						
Maryland						
Massachusetts						
Michigan						
Minnesota						
Mississippi						
Missouri						
Montana						
Nebraska	NA	NA	NA	NA	NA	NA
Nevada						
New Hampshire						
New Jersey						
New Mexico						
New York						
North Carolina						
North Dakota						
Ohio						
Oklahoma						
Oregon						
Pennsylvania						
Rhode Island						
South Carolina						
South Dakota						
Tennessee						
Texas						
Utah						
Vermont						
Virginia						
Washington						
West Virginia						
Wisconsin						
Wyoming						

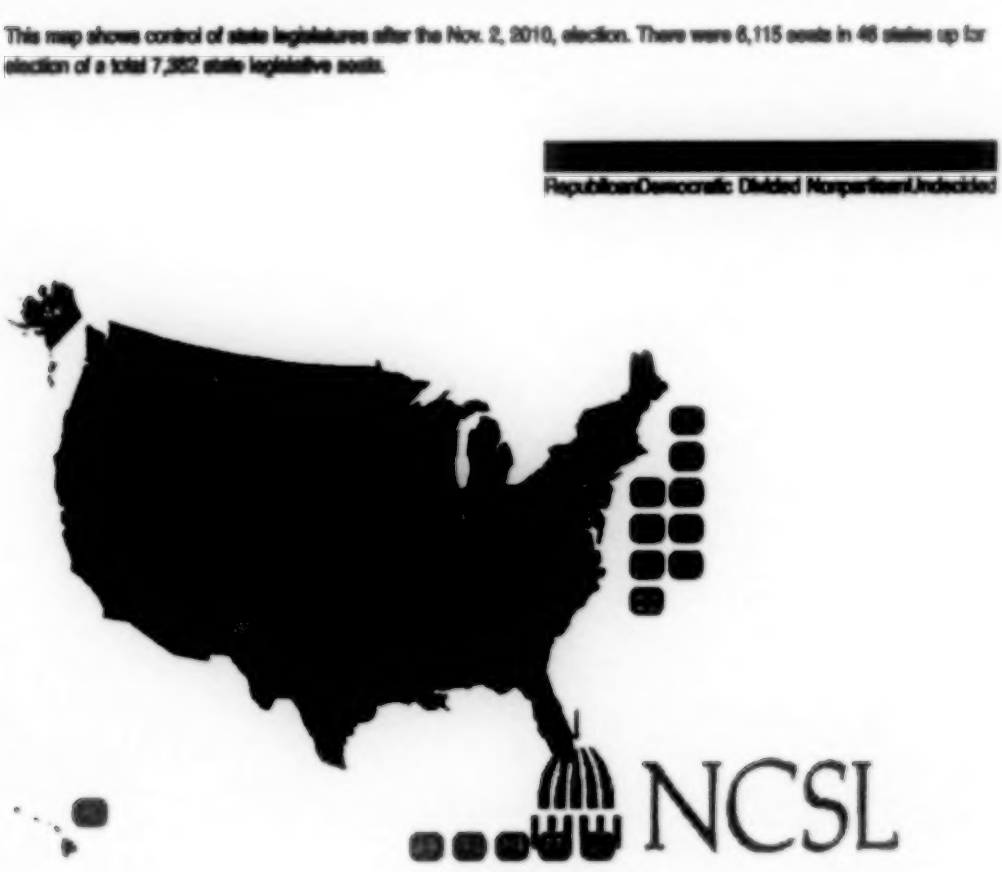
Key:

Split

= Both legislative chambers have Republican majorities
= Both legislative chambers have Democratic majorities
= Neither party had majorities in both legislative chambers
= Nebraska is a non-partisan unicameral legislature

National Conference of State Legislatures

The next decennial election found the Republican party at a near high water mark. Democrats controlled 16 legislatures, while Republicans held 25 legislatures, and 8 were split control. A visual representation of this distribution, available at NCSL, *2010 Post-Election Party Control of State Legislatures*, http://www.ncsl.org/research/elections-and-campaigns/2010-postelection-control-of-legislatures.aspx (accessed Feb. 2, 2018) is reproduced here:


This map shows control of state legislatures after the Nov. 2, 2010, election. There were 6,115 seats in 46 states up for election of a total 7,382 state legislative seats.
RepublicanDemocratic: Divided NonpartisanUndecided
NCSL

Following the 2018 elections, these numbers shifted dramatically again. According to NCSL, there were 30 states with Republican legislative majorities, 18 with Democratic majorities, and 1 with split control. The post-2018 information is available here: http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx.

The dissenting opinion in *Whitford v. Gill* expressed well the concerns with volatile electoral patterns. "When the Plaintiffs say there is a large efficiency gap, all they are saying is that one side won a lot of close winner-take-all districts. As such, the efficiency gap appears to be of little utility in measuring constitutional injury." As Judge Greisbach noted, "Professor Nicholas Goedert, credibly testified that wave elections were relatively common." *Whitford*, 218 F. Supp. 3d at 959. In fact, some experts believe that wave elections are now the "norm." *Id.* at 862. This suggests that the trends noted by Sundquist, Bartels, and nearly every observer of American politics has been that the electorate's voting behavior constantly changes. Judge Greibach even noted that granular trends of volatility do not even remain constant throughout the geographic unit that comprises even a single state. He wrote:

> President Obama was hugely successful in a few, traditional bastions of Democratic voters—even more successful than in 2008. But in the rest of the state, his support declined. President Obama's landslide wins in the Cities of Milwaukee and Madison resulted in *hundreds of thousands* of wasted votes—not wasted for the President, of

> course, but for the down-ticket assembly candidates who either won in landslide victories or, more commonly, were unopposed entirely.

Id. at 960. The implications for elections conducted on a district by district basis are obvious. Even changes in the electorate in a national or statewide level say nothing about how voters in a particular area of a state or a region of a state might act relative to statewide or national trends. And when voters are located in particular geographic areas, the potential for unique voting behavior in particular districts remains and is difficult to predict.

Simply put, voters do not vote in a vacuum and there are innumerable reasons they vote for certain candidates, only one of which may be partisan affiliation, and voters in different parts of a state may vote for different candidates in different levels of elections. Voter behavior is inherently unpredictable and volatile from election-to-election and candidate-to-candidate. This means that, contrary to what Appellees may argue, there is real competition in nearly every district for the support of voters every election cycle. *See also generally Brief of Amicus Curiae, The National Republican Congressional Committee in Support of Appellants, Gill v. Whitford*, No. 16-1161 at 41-55 (Aug. 4, 2017).

For decades, academic scholars have studied political trends over time, and there is somewhat of a consensus that change is constant. What Plaintiffs-Appellees ask the Court to do is require that federal judges ignore long term trends of constant change, and assume that each subsequent election is

predictable by the previous election. On that basis, they say, federal courts should make determinations of the constitutionality of redistricting maps using numbers from the last several elections. They ask that the use of this "social science" to predict the future be enshrined in this Court's interpretation of the Constitution and applied to every Congressional and legislative map across the country. This Court should reject such a short term and rigid view of the American electorate and approach this request with skepticism about the ability of federal judges to accurately predict future political trends.

III. PARTISAN GERRYMANDERING CLAIMS ARE NOT JUSTICIABLE

Every litigant that has advanced a partisan gerrymandering claim has asked that courts consider as an issue the political intent and partisan impact of the maps. They claim that assessing redistricting's partisan effect on elections or electability of candidates is a necessary part of any justiciable standard under which such claims could weighed. Indeed, in order to adjudicate partisan gerrymandering claims courts must "assess the effects of partisan gerrymandering, . . . fashion a standard for evaluating a violation, and finally . . . craft a remedy." *Vieth*, 541 U.S. at 287 (*plurality op.*) (citing *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment). The mutability of voters' partisanship and electoral choices make all of these impossible to accomplish in redistricting challenges. *Id.* The only logical conclusion of this paradox is that partisan gerrymandering claims cannot be justiciable. *See id.* at 287 (*plurality op.*) (citing

Bandemer, 478 U.S. at 156 (O'Connor, J., concurring in judgment).

Justice O'Connor put it perfectly over 30 years ago: "To allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U.S. at 160 (O'Connor, J. concurring). This is because "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Vieth*, 541 U.S. at 287. *See also supra*.

Indeed, even Justice Kennedy, who repeatedly refused to foreclose the possibility of finding a justiciable standard to adjudicate partisan redistricting challenges, expressed wariness at the prospect of "adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006). *See also Gill*, 138 S. Ct. at 1928. *See also* Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1365 (1987) (noting that the *Bandemer* plurality's standard requires judgments that are "largely subjective and beg questions that lie at the heart of political competition in a democracy"); *Vieth*, 541 U.S. at 283 (plurality op.).

Plaintiffs-Appellees present to this Court a claim that "partisan gerrymandering" is an unbounded exercise that will ***always*** control the outcome of elections. Not only has every judicial conclusion about the future outcomes of elections been wrong, but the fundamental truth about

"partisan gerrymandering" was well understood by Justice O'Connor. She wrote:

> [T]here is good reason to think that political gerrymandering is a self-limiting enterprise. In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat. – rights they may refuse to accept past a certain point. Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more search in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious. More generally, each major party presumably has ample weapons at its disposal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one. There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves. Absent such proof, I see no basis for concluding that there is a need, let alone a constitutional basis, for judicial intervention.

Bandemer, 478 U.S. 152. Justice O'Connor's words were no truer in 1984 than they are today. On the basis of her observations from this Court after her many years as an elected official, her words have proven true over the last 35 years of judicial missed predictions and electoral experiences. This Court should finally accept her conclusion and determine

that there is no basis for judicial intervention in these cases.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court and hold that partisan redistricting claims are not justiciable.

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